

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

AKORN HOLDING COMPANY, LLC,
*et al.*¹

Debtors.

Chapter 7

Case 23-10253 (KBO)

Related to Docket No. 106, 137, 146

**OBJECTION OF AMERISOURCEBERGEN DRUG CORPORATION
AND AFFILIATES TO CURE AMOUNTS AND RESERVATION OF RIGHTS**

AmerisourceBergen Drug Corporation and its affiliates, including, but not limited to AmerisourceBergen Global Manufacturer Services GmbH, and MWI Veterinary Supply Co. (collectively “Amerisource”), by and through its undersigned counsel, hereby submits this objection to the cure amounts proposed by the chapter 7 trustee (the “Trustee”) for the above captioned debtors (the “Debtors”) and reserves all rights in connection therewith, and in support thereof, respectfully states as follows:

BACKGROUND

1. On February 23, 2023 (the “Petition Date”), the above captioned debtors (collectively, the “Debtors”) each commenced their cases by filing a voluntary petition for relief under chapter 7 of title 11 of the United States Code (the “Bankruptcy Code”) with the United States Bankruptcy Court for the District of Delaware (the “Court”).

¹ The Debtors in these chapter 7 cases, along with the last four digits of their federal tax identification numbers, and cases numbers are Akorn Holding Company LLC (9190), Case No. 23-10253 (KBO); Akorn Intermediate Company LLC (6123), Case No. 23-10254 (KBO); and Akorn Operating Company LLC (6184), Case No. 23- 10255. The Debtors’ headquarters is located at 5605 CenterPoint Court, Gurnee, IL 60031.

2. On or about the Petition Date, the Office of the United States Trustee appointed George L. Miller as the Trustee.

3. On April 20, 2023, the Trustee filed a motion seeking authority to sell the Debtors' assets and approve bidding procedures (Docket No 106, the "Sale Motion").

4. On April 28, 2023 the Court entered an order approving bidding procedures with respect to the Sale Motion (Docket No. 137, the "Bidding Procedures Order").

5. On May 1, 2023, the Trustee filed the *Notice of Executory Contracts and Unexpired Leases that May Be Assumed and Assigned, Pursuant to Section 365 of the Bankruptcy Code, in Connection with the Sale of Substantially all of the Debtors' Assets, and the Proposed Cure Amounts* (Docket No. 146, the "Cure Notice").

6. The Cure Notice lists a number of agreements with Amerisource and its affiliates, each with a proposed cure amount of \$0. A number of these agreements appear to be parts of larger agreements, including items that are described as addendums. A copy of the listing of contracts with Amerisource is attached hereto as Exhibit A. Amerisource reserves the right to supplement this objection if, and when, the details of these alleged executory contracts are identified. If the Trustee wishes to assign these agreements, he may assign only the entire agreement and is not able to modify the agreements to pick and chose certain parts of the agreements to assign. Amerisource objects to any attempt to assume and assign less than the whole agreement.

7. Amerisource did business with the Debtors under distribution services agreements (collectively, the "DSA") by purchasing product from the Debtors and distributing it to retailers and others. Under the DSA, Amerisource is entitled to certain claims and credits (the "DSA Credits") including, but not limited to, prompt pay discounts, distribution fees, chargebacks,

rejected inventory claims, inventory shortage claims, inventory price discrepancy claims, returned product claims, and recall claims.

8. Certain of the DSA Credits arise and accrue from time to time and can take a considerable amount of time to discover, such as returns of product from the end-customer to Amerisource. There may be significant amounts of DSA Credits that become due that are not yet known, such as returns of products or recalls, and the amounts of DSA Credits will continue to change prior to the closing of any sale. Notably, Akorn has agreed to a voluntary recall of its products that may result in significant amounts due from the Debtors to Amerisource. The total amount of such claims is not yet known and will likely not be known for some time. The DSA provides for the right of direct payment to Amerisource from the Debtors for recall items in addition to allowing Amerisource to receive credits for such claims. Amerisource reserves the right to update the demanded cure amount as more information becomes available.

OBJECTION

I. The Trustee Must Fully Cure All Obligations Under the Agreements Prior to Assumption and Assignment

9. Prior to assumption of the DSA, the Trustee is required by section 365(b)(1) of the Bankruptcy Code to cure all outstanding defaults under the Agreements and compensate Amerisource for any actual pecuniary loss, including the payment of related attorneys' fees. *See* 11 U.S.C. §365(b)(1)(B). Amerisource anticipates that the amount needed to satisfy the amounts due to Amerisource under the DSA will continue to change prior to the sale. To the extent that any assignee does not agree to honor the ongoing setoff and recoupment of amounts under the DSA regardless of when such amounts accrue, the full potential amount of the DSA Credits must be reserved by Amerisource prior to the sale.

10. The assumption and assignment of any agreements with Amerisource also cannot cutoff any of the DSA Credits, including the direct right to payment for recall obligations. Even though a significant amount of these recall obligations may not be known until after the completion of a sale, the products giving rise to such recall obligations were purchased prior to the sale. Some authority exists that would suggest that the recall obligations arose at the time the products were sold and thus the cure of these contracts must provide for the satisfaction of the recall obligations, whether by the purchaser or by the Trustee.

11. Furthermore, as part of Amerisource's pecuniary losses, it is entitled to attorneys' fees in connection with the Trustee's obligation to cure all monetary defaults under the DSA. Amerisource hereby reserves the right to amend the cure amount to reflect such additional amounts, which have not yet been billed or become due under the DSA.

II. The Trustee Must Provide Adequate Assurance of Future Performance

12. The Trustee must provide adequate assurance of future performance under the Agreements pursuant to Section 365(b)(1)(C) of the Bankruptcy Code. Amerisource requires that the Trustee and/or any potential assignee of the DSA provide evidence of the proposed assignees' ability to perform under the DSA.

13. Any assignee must demonstrate that it will be able to perform under the DSA and honor returns, chargebacks, rebates, recall obligations, and any other credits to which Amerisource is entitled regardless of whether those returns, chargebacks, rebates, recall obligations, or other credits emanate from transactions that occurred pre-petition, post-petition, before the sale or subsequent to the sale.

WHEREFORE, Amerisource respectfully requests the entry of an order conditioning the assumption and assignment of the DSA on (i) the payment of all outstanding cure amounts prior

to the sale, including additional amounts incurred subsequent to the filing of this objection and reservation of rights and (ii) providing Amerisource with adequate assurance of future performance with respect to the Agreements, together with such other and further relief as is just and proper.

Dated: May 16, 2023
Wilmington, Delaware

/s/ Michael W. Yurkewicz

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*Counsel for AmerisourceBergen Drug Corporation
and Affiliates*

EXHIBIT A

Name of Agreement	Counter Party	Counter Party Address	Counter Party	Country Party Address	Debtor Party	Cure Amount
Distribution Services Agreement, by and between AmerisourceBergen Drug Corporation, Bellco Drug Corp., and Akorn, Inc., dated January 1, 2014, as amended by that certain Amendment to Distribution Services Agreement dated April 17, 2015, as further amended by that certain Letter regarding Modification of Section 1(a) of Distribution Services Agreement, dated January 9, 2017	AmerisourceBergen Drug Corporation	AmerisourceBergen Drug Corporation 1300 Morris Drive Chesterbrook, PA 19087	Bellco Drug Corp.	Bellco Drug Corp. 5500 New Horizons Blvd. N. Amityville, NY 11701	Akorn Operating Company LLC	\$0
Master Distribution Services Agreement, between AmerisourceBergen Drug Corporation and ASD Specialty Healthcare, LLC and Akorn Operating Company, dated January 1, 2021, as amended by that certain First Amendment to Master Distribution Services Agreement dated January 1, 2021	AmerisourceBergen Drug Corporation	AmerisourceBergen Drug Corporation 1300 Morris Drive Chesterbrook, PA 19087	ASD Specialty Healthcare, LLC	ASD Specialty Healthcare, LLC 5025 S Plano Pkwy Carrollton, TX 75010	Akorn Operating Company LLC	\$0
Pharmagen Addendum to Master Distribution Services Agreement, by and between AmerisourceBergen Drug Corporation and ASD Specialty Healthcare, LLC and Akorn Operating Company, dated January 1, 2021	AmerisourceBergen Drug Corporation	AmerisourceBergen Drug Corporation 1300 Morris Drive Chesterbrook, PA 19087	ASD Specialty Healthcare, LLC	ASD Specialty Healthcare, LLC 5025 S Plano Pkwy Carrollton, TX 75010	Akorn Operating Company LLC	\$0
Pharmagen Program Addendum to Master Distribution Services Agreement, by and among AmerisourceBergen Drug Corporation, ASD Specialty Healthcare, LLC, operating through its ASD Healthcare, Oncology Supply and Besse Medical divisions and Akorn Operating Company, dated January 1, 2021	AmerisourceBergen Drug Corporation	AmerisourceBergen Drug Corporation 1300 Morris Drive Chesterbrook, PA 19087	ASD Specialty Healthcare, LLC operating through its ASD Healthcare, Oncology Supply and Besse Medical divisions	ASD Specialty Healthcare, LLC 5025 S Plano Pkwy Carrollton, TX 75010	Akorn Operating Company LLC	\$0
PRxO Addendum to Master Distribution Services Agreement, by and between AmerisourceBergen Drug Corporation and ASD Specialty Healthcare, LLC and Akorn Operating Company, dated January 1, 2021	AmerisourceBergen Drug Corporation	AmerisourceBergen Drug Corporation 1300 Morris Drive Chesterbrook, PA 19087	ASD Specialty Healthcare, LLC	ASD Specialty Healthcare, LLC 5025 S Plano Pkwy Carrollton, TX 75010	Akorn Operating Company LLC	\$0
PRxO Generics Program Addendum to Master Distribution Services Agreement, by and among AmerisourceBergen Drug Corporation, ASD Specialty Healthcare, LLC operating through its ASD Healthcare, Oncology Supply and Besse Medical divisions and Akorn Operating Company (d.b.a. Akorn Inc.), dated as of January 1, 2021	AmerisourceBergen Drug Corporation	AmerisourceBergen Drug Corporation 1300 Morris Drive Chesterbrook, PA 19087	ASD Specialty Healthcare, LLC operating through its ASD Healthcare, Oncology Supply and Besse Medical divisions	ASD Specialty Healthcare, LLC 5025 S Plano Pkwy Carrollton, TX 75010	Akorn Operating Company LLC	\$0
Master Services Agreement, by and between AmerisourceBergen Global Manufacturer Services GmbH and Akorn Operating Company, dated January 1, 2021	AmerisourceBergen Global Manufacturer Services GmbH	AmerisourceBergen Global Manufacturer Services GmbH Bogenschutzenstrasse 9A Bern, 3008			Akorn Operating Company LLC	\$0
Pharmagen Generics Program Addendum to Master Services Agreement, by and between AmerisourceBergen Global Manufacturer Services GmbH and Akorn Operating Company, dated January 1, 2021	AmerisourceBergen Global Manufacturer Services GmbH	AmerisourceBergen Global Manufacturer Services GmbH Bogenschutzenstrasse 9A Bern, 3008			Akorn Operating Company LLC	\$0
PRxO Generics Program Addendum to Master Services Agreement, by and between AmerisourceBergen Global Manufacturer Services GmbH and Akorn Operating Company, dated January 1, 2021	AmerisourceBergen Global Manufacturer Services GmbH	AmerisourceBergen Global Manufacturer Services GmbH Bogenschutzenstrasse 9A Bern, 3008			Akorn Operating Company LLC	\$0
Animal Health Rebate Agreement, by and between Akorn Operating Company and MWI Veterinary Supply Co, dated January 1, 2021	MWI Veterinary Supply Co	MWI Veterinary Supply Co. 3041 W Pasadena Dr. Boise, ID 83705			Akorn Operating Company LLC	\$0
Distribution and Supply Agreement (Private Label), by and between MWI Veterinary Supply Co. and Akorn Operating Company, dated January 1, 2022	MWI Veterinary Supply Co	MWI Veterinary Supply Co. 3041 W. Pasadena Dr. Boise, ID 83705			Akorn Operating Company LLC	\$0
First Addendum to Distribution Agreement, by and between Akorn Operating Company and MWI Veterinary Supply Co., dated August 25, 2020	MWI Veterinary Supply Co	MWI Veterinary Supply Co. 3041 W. Pasadena Dr. Boise, ID 83705			Akorn Operating Company LLC	\$0
Distribution Services Agreement, between MWI Veterinary Supply Co. and Akorn Operating Company, dated April 1, 2021	MWI Veterinary Supply Co	MWI Veterinary Supply Co. 3041 W. Pasadena Dr. Boise, ID 83705			Akorn Operating Company LLC	\$0